

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 24, 2008 Session

STATE OF TENNESSEE v. KEVIN ALLEN GENTRY

Direct Appeal from the Circuit Court for Sevier County
No. 10704-11 Richard R. Vance, Judge

No. E2007-02029-CCA-R3-CD Filed July 30, 2008

A Sevier County jury convicted the Defendant, Kevin Allen Gentry, of one count of rape of a child. The trial court sentenced him to twenty-five years in prison, to be served at one-hundred percent. The Defendant appeals, contending that the trial court erred when it allowed into evidence an audiotape of statements made by the Defendant. Having determined that we lack jurisdiction in the case, we dismiss the Defendant's appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Brent Horst, Nashville, Tennessee, for the Appellant, Kevin Allen Gentry.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; James Dunn, District Attorney General; Jeremy D. Ball, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case relates to the Defendant's raping of the victim, who was nine years old at the time. The record reflects that in January 2005, a Sevier County grand jury indicted the Defendant on one count of rape of a child. Following a July 2007 jury trial, the Defendant was convicted of the charged offense and sentenced to twenty-five years. The Defendant filed a motion for a new trial, and the trial court orally denied that motion on August 24, 2007. The

trial court never entered a written order relating to the motion for a new trial. The Defendant filed his notice of appeal on September 5, 2007.

The Tennessee Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). The appeal is initiated by filing a notice of appeal within thirty days of the final judgment date. Tenn. R. App. P. 4(a). In criminal actions, “if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant . . . under Rule 33(a) for a new trial, . . . the time for appeal for all parties shall run from entry of the order denying a new trial” Tenn. R. App. P. 4(c). Until the trial court denies the motion for new trial, this Court does not have jurisdiction over the case. *See e.g., State v. James Lee Foreman, II*, M2002-02595-CCA-R3-CD, 2004 WL 404696, at *2 (Tenn. Crim. App., at Nashville, Mar. 24, 2004) (dismissing appeal for lack of jurisdiction because appellate record did not contain a written order denying the motion for a new trial, a transcript of hearing on the motion for a new trial, or a document showing that the trial court denied the motion for a new trial), *no Tenn. R. App. P. 11 application filed*; *see also State v. Dorris Nell Jones*, No. M2007-00791-CCA-R3-CD, 2008 WL 544576, at *1-2 (Tenn. Crim. App., at Nashville, Feb. 27, 2008) (dismissing appeal for lack of jurisdiction because the record did not contain a motion for a new trial, the trial court’s hearing on that motion, or an order denying the motion), *no Tenn. R. App. P. 11 application filed*; *State v. Terry Lynn Byington*, No. E2006-02069-CCA-R3-CD, 2007 WL 4167893, at *1-2 (Tenn. Crim. App., at Knoxville, Nov. 26, 2007) (dismissing appeal for lack of jurisdiction because the appellate record did not contain the motion for a new trial or written order that the motion for a new trial was denied), *Tenn. R. App. P. 11 application granted* (Tenn. June 14, 2008); *State v. Gregory O. Cherry*, No. W2006-00015-CCA-R3-CD, 2007 WL 2155740, at *1 (Tenn. Crim. App., at Jackson, July 27, 2007) (dismissing appeal for lack of jurisdiction because the record did not contain an order or transcript of any proceedings showing that disposition was made on the motion for a new trial), *no Tenn. R. App. P. 11 application filed*; *State v. Brent Tolbert*, No. M2006-01621-CCA-R3-CD, 2007 WL 2026623, at *1 (Tenn. Crim. App., at Nashville, June 28, 2007) (dismissing appeal for lack of jurisdiction because the trial court “never entered a written order denying the motion” for a new trial), *no Tenn. R. App. P. 11 application filed*.

We review the holdings in each of the aforementioned cases in part because on May 5, 2008, the Tennessee Supreme Court granted permission to appeal in *Byington*, one of the cases upon which we rely. In the order granting the appeal, the Supreme Court stated, “For oral argument, the Court is particularly interested in the following issue: Whether appellate jurisdiction can be conferred through a minute entry indicating denial of the motion for new trial, without the entry of a separate written order.”

The record in this case, unlike some of the aforementioned cases, contains a copy of the motion for new trial and a transcript of the hearing on that motion, which shows that the trial court found that the motion for a new trial should be denied. There was, however, no written order to that effect entered. We also found no minute entry indicating the denial of the motion for a new trial. While we anticipate that the Supreme Court in *Byington* will soon provide guidance, we conclude that, pursuant to the current state of the law, a written order disposing of

the motion for a new trial is required to confer upon this court jurisdiction over this appeal. Because there is no such order in the record, we dismiss this appeal for lack of jurisdiction.

II. Conclusion

For the foregoing reason, the appeal is dismissed.

ROBERT W. WEDEMEYER, JUDGE